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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term 1983

No. _____

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

vs.

JAMES G. WATT, et al., and WALKER RIVER
PAIUTE TRIBE OF NEVADA,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[redacted]AMICUS CURIAE BRIEF BY BURLINGTON NORTHERN RAILROAD COMPANY AND MOTION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY SOUTHERN PACIFIC TRANSPORTATION COMPANY

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PRAYN PRINTING COMPANY SEATTLE, WASHINGTON

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FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

COMES NOW Burlington Northern Railroad Company and files this, its motion to file amicus curiae brief and motion in support of Southern Pacific Transportation Company's petition for certiorari and states:

Movant Burlington Northern Railroad Company has a direct and substantial interest in the issues involved in this proceeding which may not adequately be addressed by the current parties. Additionally, movant would show that the issues in this case involve areas of national transportation policy and are of vital importance to the national interest. Movant has not yet received written consent of all parties to this proceeding to file an amicus brief but such consent is anticipated.

Burlington Northern Railroad Company is a Class I common carrier by rail

operating in interstate and foreign commerce. A portion of this railroad system includes a line to Anacortes, Washington, which serves a number of rail shippers, including two large petroleum refineries which rely heavily on rail service.

In 1977 the Swinomish Indian Community claimed ownership of a portion of the Burlington Northern Railroad Company's right of way between Anacortes and the remainder of Burlington Northern's railroad. Although Burlington Northern denies that the Swinomish Tribal Community has any interest in said right of way, nevertheless a right of way filing was made by Burlington Northern Railroad Company under the Act of 1899, 25 U.S.C. §312-318, in order to continue rail service to Anacortes if the court determined that the tribe owned the lands in dispute.

As in the Southern Pacific case, the Secretary of the Interior rejected Burlington Northern Railroad Company's right of way filing under the 1899 Act for lack of tribal consent. Burlington Northern then brought an action in the U.S. District Court for the Western District of Washington to require the Secretary of the Interior to accept its right of way filing on the ground that the 1899 Act does not require tribal consent and that imposing the requirement of tribal consent effectively repeals the 1899 Act.[1]

The District Court for the Western District of Washington, having been made aware of the pendency of the matter of Southern Pacific v. Watt, elected to stay the proceeding until the Ninth United

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1. Burlington Northern v. Andrus, et al., United States District Court, Western District of Washington, Cause No. C79-1199V

States Circuit Court of Appeals ruled finally on the Southern Pacific case. If the tribal consent requirement is sustained in the Southern Pacific case, and the United States District Court for the Western District of Washington concludes that the Swinomish Tribal Community or the United States of America has ownership of any portion of Burlington Northern's right of way, the effect will probably be to either cut off rail service to Anacortes, Washington, or to require the Burlington Northern Railroad Company to comply with excessive tribal demands for compensation, thus unreasonably increasing the cost of service to consumers.

This is not an isolated circumstance. Burlington Northern Railroad Company crosses a number of Indian reservations, large and small, throughout its

service territory. In order to maintain a modern, safe, efficient railroad system, it is necessary from time to time to alter rights of way to decrease gradient and curvature or to improve alignments. The right of way adjustments to achieve these results occur regularly and will continue to occur in the future. If the Ninth Circuit's interpretation of the 1899 Act is sustained, the effect will be to freeze in time all railroad rights of way through Indian reservation trust lands and prevent needed alterations and modifications to maintain a safe and efficient rail system unless tribal consent is granted for such change. Such an interpretation subjects vital rail service to the whim of the tribe.

CONCLUSION

Burlington Northern believes that a reading of the Act of 1899 and its

carefully designed provisions to establish just compensation compels the conclusion that it is an eminent domain statute which does not require tribal consent and which is effectively repealed where the Secretary engraphs the requirement of tribal consent. Burlington Northern respectfully submits that the Southern Pacific's Petition for Certiorari should be granted and that the Ninth Circuit ruling in this case be reversed with the Secretary of the Interior instructed to accept Southern Pacific's right of way filing under the 1899 Act. Movant further requests leave to file an amicus curiae brief should petitioner's petition for certiorari be granted.

Respectfully submitted,

BURLINGTON NORTHERN RAILROAD COMPANY

By_____
William A. Brasher

AFFIDAVIT OF SERVICE BY MAIL

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn, on oath states: That on this day affiant deposited in the mails of the United States of America properly stamped and addressed envelopes containing a copy of this document directed to the attorneys of record in this matter, as follows:

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_____
William A. Brasher

SUBSCRIBED AND SWORN TO before me this _____ day of August, 1983.

_____
Notary Public in and for the State of Washington, residing at _____